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Introducing a fairness based theory of prosecutorial legitimacy before the International Criminal Court

Maria Varaki

Abstract

The International Criminal Court became operative ten years ago. The first Prosecutor of the Court faced the enormous challenge to set up a series of policies addressing at the same time the backlog of overriding expectations. His task was daunting and his prosecutorial choices triggered a series of controversies among a variety of relevant audiences, while the concept of legitimacy appeared to become the panacea to the debate. The current contribution purports to achieve a twofold goal via a doctrinal, descriptive but also normative angle; 1) To provide an alternative normative theory of the thorny principle of prosecutorial discretion and particularly of the interests of justice reference, based on the fairness aspect of legitimacy; 2) to recommend an alternative to the adopted, as of today, prosecutorial policy with regard to the interests of justice reference in article 53, emphasizing its long term effect on the overall perception of the Court.

Introduction

Following its adoption in 1998 the Rome Statute,¹ the International Criminal Court (the Court) was characterized in rather high prose by the then UN Secretary General “a gift of hope for future generations.”² Twelve years later the current Secretary General of the United Nations reiterated the same belief, stating that the “[t]he Rome Statute represents the best that is in us, our most noble instinct ... the instinct for peace and justice.”³

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¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

² Kofi Annan, Former Secretary General of the United Nations, Address at the Rome Conference (Jul.18, 1998).

³ The Secretary General, An age of Accountability, Address at the Review Conference on the International Criminal Court Kampala (May 31, 2010) *available at*: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-BanKi-moon-ENG.pdf.

Notwithstanding these initial triumphant acceptance, the Court has completed its first decade of operation, being subjected to scathing critique by academics and experts.⁴ Among others, the policy of self-referrals, the selection of the first situations and cases, the slow and controversial judicial progress,⁵ the accusation of being solely an “African Court”⁶ and the tension between judicial intervention and so called “peace”, triggered serious concerns even from the side of the most persistent proponents of the Court.⁷

Over the last ten years, the Office of the Prosecutor and the fundamental concept of prosecutorial discretion, as it develops in article 53, lie in the heart of the controversy about the a-political nature of the Court and, ultimately, its role, limits and goals.⁸ On one hand, the very first Prosecutor of the Court adopted a single and persistent response to every critique about his choices, focusing on his role as a judicial actor who simply applies the law, irrespective of exogenous factors. On the other hand, the predominant academic response, with some rare exemptions, has been focused on the need for establishing ex ante selection criteria for situations and cases and the controversial notions of gravity and the interests of justice. In particular, these two last concepts are considered by many to be a loophole, that carries the risk to defy the conventional wisdom that the International Criminal Court is an independent and autonomous institution, purported to combat impunity, promote accountability and contribute to prevention of criminality, independently of the political context. Within this context the quest for legitimacy has become a major challenge raising an interesting but narrowly defined discourse especially among legal audiences.

The current proposal purports to precisely examine a particular component of the exercise of prosecutorial discretion during the term of the very first Prosecutor of

⁴ See DAVID BOSCO, *ROUGH JUSTICE, THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (2014).

⁵ Prosecutor v. Ntaganda Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012).

⁶ Charles Jallow, *Regionalising International Criminal Law*, 9 INT’L CRIM. L. REV. 445-499 (2009).

⁷ Mahnouch H. Arsanjani and W. Michael Reisman, *The Law in Action of the International Criminal Court*, 99 AM.J. INT’L L. 385 (2005), Claus Kress, *Self-referrals’ and ‘Waivers of Complementarity*, 2 J. INT’L CRIM. JUST. 944, 946 (2004), William Schabas, *First Prosecutions at the International Criminal Court*, 27 HUM. RTS. L.J. (2006), M. Cherif Bassiouni, *The ICC-Quo Vadis?*, 4 J. INT’L CRIM. JUST. (2006), but for the opposite position see Payam Akhavan, *Self Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?* 21 CRIM. L. F. (2010), Daryl Robinson, *The mysterious mysteriousness of complementarity*, 21 CRIM. L. F. (2010), Rod Rastan, *Comment on Victor’s Justice and the viability of ex ante standards*, 43 J. MARSHALL L. REV. 569-602 (2010).

⁸ See the contributions analyzing the OTP in *THE FIRST GLOBAL PROSECUTOR, PROMISE AND CONSTRAINTS* (Minow, Frost and Whiting, eds., 2015).

the Court (the adopted policy by the Office of the Prosecutor on the interests of justice reference in article 53) and link it to the broader question of legitimacy of the Prosecutor's Office. The concept of justice within the Rome Statute represents the classic format of a retributive version, combined with the other goals of criminal law such as deterrence, rehabilitation, reconciliation and expressivism.⁹ However, the reference "interests of justice" in article 53 appears to be an exception to the basic rule, a state of exception.¹⁰ As it is widely acknowledged, it represents a broader concept of justice transcending the strict width of prosecutorial criminal justice. Moreover, it is considered to be so novel that it "[d]oes not correspond to any provision in positive law."¹¹ If the interests of justice clause is an exception to the rule, this proposition definitely seems to be paradoxical. Can a non-strictly legalistic form of justice be included in the Rome Statute, the "apotheosis of the international insistence on prosecutions" to use Justice Goldstone's reference to the Statute.¹²

The targeted aim of this proposal is not an examination of the overall performance of the International Criminal Court. The predominant goal of this research challenges the adopted policy by the Office of the Prosecutor on the interests of justice reference in article 53. The main research question does not purport to provide a specific definition on the content of the word justice within the interests of justice reference. Instead it focuses on the legitimacy challenges and legal and policy dilemmas arising from this specific term for the exercise of prosecutorial discretion as a long term project.

The concept of prosecutorial discretion in international criminal justice

Ronald Dworkin has stated that

"Discretion like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, 'Discretion under which standards?' or 'Discretion as to which authority?'"¹³

⁹ For the purposes of criminal law see, BECCARIA, ON CRIMES AND PUNISHMENTS (David Young trans. 1986), H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1970) and more recently G.P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 50 -76 (1998) and specifically for international criminal law see MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 149-180 (2007).

¹⁰ GIORGIO AGAMBEN, STATE OF EXCEPTION (2005).

¹¹ Mireille Delmas-Marty, *Interaction between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J. INT'L CRIM. JUST. 10 (2006).

¹² Richard Goldstone & Nicole Kritz, *International Criminal Court, In the Interests of Justice and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 L. J. INT'L L. 655 (2000).

¹³ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1998).

Particularly in the field of international criminal justice, the notion of prosecutorial discretion carries an interesting but controversial dynamic. The overall question of prosecutorial discretion has been addressed extensively by a series of scholars, who have covered many aspects of the challenges that the Prosecutor of an international criminal tribunal in general and of the International Criminal Court in particular has to face.¹⁴ The former Prosecutor of the International Criminal tribunal for Former Yugoslavia, Justice Louise Arbour, in a statement before the Preparatory Committee during its December 1997 session, describing the difference between domestic and international prosecutions stressed that in the latter case

[t]he discretion to prosecute is considerably larger and the criteria upon which such prosecutorial discretion is to be exercised are ill defined and complex. In my experience based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention rather than to weed out weak or frivolous ones.¹⁵

¹⁴ See D.D. Ntanda Nsereko, *Prosecutorial Discretion before National Courts and International Tribunals*, 3 J. INT'L CRIM. JUST. (2005), A. Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. (2003), M.B. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT'L CRIM. JUST. (2004), Geert-Jan Alexander Knoops, *Challenging the legitimacy of initiating contemporary international criminal proceedings: rethinking prosecutorial discretionary powers from a legal, ethical and political perspective*, 15 CRIM. L. F. (2004), Christopher Keith Hall, *The powers and role of the prosecutor of the International Criminal Court in the Global fight against Impunity*, 17 L. J. INT'L L. (2004) Hassan B.Jallow, *Prosecutorial discretion and International Criminal Justice*, 3 J. INT'L CRIM. JUST. (2005), William A. Schabas, *Prosecutorial Discretion v. Judicial activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. (2008), Luc Côté, *International Justice: Tightening up the Rules of the Game*, 81 INT'L REV. R. C. (2006), Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law* 3 J. INT'L CRIM. JUST. (2005), H. Olásolo, *The Prosecutor of the ICC before the initiation of investigations: A quasi judicial or a political body?*, 3 INT'L CRIM. L. REV. (2003), A. Greenawalt, *Justice without politics? Political Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. (2007), Carsten Stahn, *Judicial review of prosecutorial discretion, five years on*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Stahn and Sluiter eds., 2009), Jens David Ohlin, *Peace, security and Prosecutorial Discretion*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Stahn and Sluiter eds., 2009), Fabricio Guariglia, *The Selection of cases by the Office of the Prosecutor of the International Criminal Court*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Stahn and Sluiter eds., 2009), William A. Schabas, *Prosecutorial discretion and gravity*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Stahn and Sluiter eds., 2009), Jan Wouters, Sten Verhoeven and Bruno Demeyere, *The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT (Doria, Gasser and Bassiouni eds., 2009), Danesh Sarooshi, *Prosecutorial Policy and the ICC, Prosecutor's Proprio Motu action of Self-Denial?*, 2 J. INT'L CRIM. JUST. (2004), Chris Gallavin, *Prosecutorial Discretion within the ICC: Under the pressure of Justice*, 17 CRIM. L. F (2006), James A. Goldston, *More Candour about Criteria, The exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUST. (2010), Michael J. Struett, *The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court*, in GOVERNANCE, ORDER AND THE INTERNATIONAL CRIMINAL COURT 107-132 (Steven C. Roach ed., 2009), Frédéric Mégret, *International Prosecutors: Accountability and Ethics*, in INTERNATIONAL PROSECUTORS 416 (Reydam, Wouters & Ryngaert eds., 2012).

¹⁵ Justice Louise Arbour, Statement at the Preparatory Committee on the Establishment of a International Criminal Court 7-8 (Dec. 8, 1997)

The principle of prosecutorial discretion has been a predominant feature of international criminal justice since Nuremberg.¹⁶ The chief prosecutors at the International Military Tribunals of Nuremberg and Tokyo had to follow the guiding principles agreed by the Allies.¹⁷ Yet both Charters of the Nuremberg and Tokyo Tribunals assigned the prosecutors with the responsibility “for the final designation of major war criminals to be tried at the tribunal.”¹⁸

In the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the feature of prosecutorial discretion is further reiterated, since the prosecutors can select cases for prosecution *ex officio*,¹⁹ “albeit within the tight jurisdictional framework of the *ad hoc* institutions.”²⁰

In the case of the International Criminal Court with its global jurisdictional terrain, the notion of prosecutorial discretion is particularly critical since the Prosecutor is empowered by the Statute to initiate independently not only prosecutions but also investigations.²¹ This is a unique feature that differentiates the ICC from the *ad hoc* and hybrid Tribunals, highlighting the statutory principle of prosecutorial independence as, prescribed in article 42 of the Rome Statute.²² Under this exceptional framework, the quest for balanced, independent and objective selection of situations and cases has been made the main priority for most of those involved in the international criminal justice project, due to the concern that

¹⁶ William A. Schabas, *Prosecutorial Discretion v. Judicial activism at the International Criminal Court*, 6 J. INT’L. CRIM. JUST. 731 (2008).

¹⁷ T. TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 40 (1992).

¹⁸ Charter of Nuremberg Tribunal, art. 14(b) and Charter of the Tokyo Tribunal, art. 8(a).

¹⁹ Art.18(1) of the ICTY Statute and Art.17(1) of the ICTR Statute prescribe that “The Prosecutor shall initiate investigations ex-officio on the basis of information obtained from any source, particularly from Governments, United Nations Organs, intergovernmental and non-governmental organizations. The Prosecutor shall access the information received or obtained and decide whether there is sufficient basis to proceed.” For a comparative presentation of all Tribunals since Nuremberg see Bergsmo, Cissé and Staker, *The Prosecutors of the International Tribunals: The cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR and the ICC Compared*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 121-154 (Louise Arbour, Albin Esser, Kai Ambos and Andrew Sanders eds., 2000).

²⁰ William A. Schabas, *Prosecutorial Discretion v. Judicial activism at the International Criminal Court*, 6 J. INT’L. CRIM. JUST. 733 (2008).

²¹ Morten Bergsmo and Pieter Kruger, *Article 53*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1066 (O. Triffterer ed., 2nd ed., 2008).

²² *Id.*

“discretion entails both risks and benefits”, as it may trigger “unjustified discrimination” and affect the perception of the criminal justice system as a whole.²³

Exercise of prosecutorial discretion - prosecutorial guidelines

Ronald Dworkin differentiates three forms of discretion. There is an initial weak version, which covers situations where the standards to be applied require a form of judgment and thus, cannot be applied mechanically.²⁴ A second weak version of discretion empowers a final judgment that cannot be reviewed due to the position of the incumbent person in the top of a hierarchy.²⁵ Whereas the strong version of discretion governs cases of absolute lack of standards, where the judgment is not subjected to any authoritative review, yet it is not totally immune to criticism.²⁶

Applying the first form of weak discretion in the context of international criminal justice Hassan Jallow has argued that

[t]he exercise of prosecutorial discretion with regard to the investigation of criminal conduct and the institution of judicial proceedings is a necessary and fundamental concept in the administration of criminal justice. Its necessity springs from the practical need for a selective rather than automatic approach to the institution of criminal proceedings, thus avoiding the overburdening and perhaps clogging of the machinery of justice. Somebody somewhere thus has to decide whether to initiate proceedings and for what offence or offences.²⁷

This “somebody somewhere” is the Prosecutor of every international criminal tribunal, whose powers have been described elsewhere as “one man’s warranty is another man’s wild card.”²⁸ If the Prosecutor of an international criminal tribunal is regarded such a predominant figure and her choices can carry a legitimised function for the overall project of international criminal justice, then how is that prosecutorial discretion exercised?

The concept of prosecutorial discretion is largely based on policy criteria, which usually are not defined in the statutes of the tribunals, leaving a huge gap of indeterminacy. This is what is called prosecutorial policy or strategy. This prosecutorial policy should be founded on public prosecutorial guidelines which

²³ A. Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 518 (2003).

²⁴ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1998).

²⁵ *Id.* at 32.

²⁶ *Id.* at 32-33.

²⁷ Hassan B. Jallow, *Prosecutorial discretion and International Criminal Justice*, 3 J. INT’L CRIM. JUST. 145(2005).

²⁸ Luc Côté, *International Justice: Tightening up the Rules of the Game*, 81 INT’L REV. R. C. 135 (2006).

according to the predominant view, strengthen the legitimacy of the Court and establish transparency.²⁹

The Prosecutor of the International Criminal Court, arguably enjoys the benefit of the vast experience obtained by the *ad hoc* tribunals during the last fifteen years. Yet, the International Criminal Court is of unique character, due to the jurisdictional structure and its differences with the *ad hoc* or hybrid tribunals should not be overlooked, in the sense that any analogous construction and application should take into consideration its *suis generis* nature.³⁰

The above introduction to the general concept of prosecutorial discretion elucidates the relativity that characterizes this principle and explains the anxiety that it has triggered among lawyers and legal scholars, who adopt a positivist conception of the law. The notion of discretion depends substantially on the context that surrounds it and it is shaped by policies and principles that identify the nature and function of the institution where it operates.³¹ The mainstream legal scholarship in the field of international criminal justice reluctantly applies the first weak form of prosecutorial discretion as developed by Dworkin. This non-mechanical application of the law thereby requires a form of guidance. The belief in the existence of objective criteria has become the principal attribute of the ‘good’ international criminal lawyer, who disassociates herself from the ‘dirty’ world of politics. Within this context, the concept of legitimacy as well has been transformed into a central subject of concern among legal scholarship attempting predominantly to objectify the exercise of prosecutorial discretion with clear selection criteria.

Prosecutorial discretion and the International Criminal Court

Article 53 of the Rome Statute prescribes the breadth and limits of prosecutorial discretion in the Rome Statute. The four paragraphs of the article

²⁹ See characteristically A. Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM.J.INT’L L. (2003).

³⁰ Hassan B. Jallow, *Prosecutorial discretion and International Criminal Justice*, 3 J.INT’L CRIM.JUST. 149-154 (2005). It should be clarified that the *ad hoc* tribunals were created by the Security Council under Chapter VII resolutions creating a different legal obligation regarding cooperation. *A contrario*, the International Criminal Court is a treaty based organisation with broader temporal and geographical jurisdictional terrain since it is an *ex ante* judicial institution that depends predominantly on state cooperation. However, the practice of the last fifteen years has indicated that the lack of state cooperation is endemic even for the *ad hoc* tribunals, despite their Security Council “birth”.

³¹ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-45 (1998), where he analyzes the different normativity between law and principles as conceived by positivist lawyers.

regulate the power of the Prosecutor to initiate an investigation and a prosecution, the review power of the Pre-Trial Chamber regarding a prosecutorial decision not to proceed and the power of the Prosecutor to reconsider her decision, sitting thus “at the junction between prosecutorial discretion and judicial review.”³²

Article 53 comes into play after the activation of one of the three triggering mechanisms (*notitia criminis*) provided in article 13.³³ A State Party can trigger the exercise of the jurisdiction of the Court via a referral of a situation to the Prosecutor.³⁴ Additionally, the Security Council acting under Chapter VII of the United Nations Charter can refer a situation to the Prosecutor.³⁵ Finally, the Prosecutor herself may initiate an investigation *proprio motu*, following an authorization by the Pre-Trial Chamber.³⁶ Immediately after the activation of the triggering procedure, the stage of preliminary examination of a situation is initiated, as it is set out in article 53 (1)(a)-(c).

In order to decide whether she should proceed or not with an investigation, the Prosecutor has to consider three accumulative criteria in subparagraphs a, b and c of article 53. Specifically the Prosecutor has to pass the test of jurisdiction; the second test is the admissibility requirement as prescribed in article 17 of the Statute and finally the Prosecutor has to decide that the investigation despite the gravity of the crimes and the interests of the victims, would not serve the interests of justice. If the Prosecutor decides not to investigate, then she is obliged to inform the Pre-Trial Chamber, if her decision is solely based on the interests of justice criterion.

Paragraph 3 of article 53 governs the judicial review of prosecutorial discretion which is twofold. When triggered at a request of the Security Council or the Referral State then the Pre-Trial Chamber may review the decision not to proceed and may request the Prosecutor to reconsider her decision.³⁷ On the other hand, when the prosecutorial decision not to proceed is based solely on the interests of justice requirement then the Pre-Trial Chamber may exercise its review powers *proprio motu*.³⁸ In that case, the decision of the Prosecutor is not valid unless confirmed by

³² WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE, Article 53, Initiation of an investigation 657 (2010).

³³ See generally HÉCTOR OLÁSULO, THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT (2005).

³⁴ Rome Statute, art.13(a) and art.14.

³⁵ *Id.* art.13(b).

³⁶ *Id.* art.13(c) and art.15

³⁷ Rome Statute, art. 53(3)(a) and Rules of Procedure and Evidence, R.107.

³⁸ Rome Statute, art. 53(3)(b).

the Pre-Trial Chamber.³⁹ If the Pre-Trial Chamber does not confirm his decision then the Prosecutor must proceed with the investigation or prosecution.⁴⁰

Professor Delmas-Marty has described article 53 as a compromise between strict legality and prosecutorial discretion.⁴¹ From one hand the indeterminacy especially of the terms “gravity” and “interests of justice” appear to allow substantial interpretative loopholes in the exercise of prosecutorial considerations for the selection of situations and cases.⁴² On the other hand, the actual scope of judicial review in article 53(3) raises a series of subquestions regarding the width of a prosecutorial decision not to investigate or prosecute and the actual judicial power to overturn a relevant decision by the Prosecutor.

Yet, as a general conclusion, it can be observed that the notion of prosecutorial discretion, as finally delineated in the Rome Statute, is not an unfettered one. On the contrary, it is subject to checks and balances, which were the product of harsh compromises and trade offs. Those limitations in the application of prosecutorial discretion are institutional and pragmatic.⁴³ In that sense the words of Louise Arbour that “[t]here is more to fear from an impotent than from an overreaching Prosecutor” sound prophetic.⁴⁴

The interests of justice and its discontents

As it was mentioned above, article 53(1)(c) of the Rome Statute dictates that the Prosecutor, in deciding whether to initiate an investigation or not, shall consider that even “taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of the justice.”⁴⁵ The interests of justice consideration is a

³⁹ *Id.*

⁴⁰ Rules of Procedure and Evidence, R. 110(2)

⁴¹ Mireille Delmas –Marty, *Interaction between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J. INT’L CRIM.JUST. (2006).

⁴² Carsten Stahn, *Judicial review of prosecutorial discretion, Five years on*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 267 (Stahn and Sluiter eds., 2009).

⁴³ Allison Danner differentiates between formal and pragmatic accountability in A. Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM.J.INT’L L. 524-534 (2003) whereas Carsten Stahn speaks of four models of accountability: political accountability, process-based checks and balances, (self-regulation) and judicial review in Carsten Stahn, *Judicial review of prosecutorial discretion, Five years on*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 259 (Stahn and Sluiter eds., 2009).

⁴⁴ Justice Louise Arbour, Statement at the Preparatory Committee on the Establishment of an International Criminal Court 7-8 (Dec. 8, 1997).

⁴⁵ See Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9(entry into force 1 July 2002)[hereinafter Rome Statute], art.53.

countervailing one.⁴⁶ Contrary to the jurisdiction and admissibility which “[a]re relatively clear and judicially cognizable notions,”⁴⁷ the interests or better non-interests of justice provision “[m]oves along a principle of largely discretionary criminal action.”⁴⁸

Article 53(2)(c) has a different wording. Subparagraph 53(2)(c) provides that the Prosecutor may conclude that a prosecution is not in the interests of justice taking under consideration all circumstances, including the gravity of the crimes, the interests of the victims and the age or infirmity of the alleged perpetrator and his or her role in the alleged crime. Here, the word “nonetheless” is missing and replaced by the term “all the circumstances.” Whereas in art. 53(1)(c) the gravity of the crimes and the interests of justice are counterweights to the interests of justice, in art. 53(2)(c), they appear to be indicators of the interests of justice consideration.⁴⁹ The additional two elements of age and infirmity carry humanitarian and practical concerns,⁵⁰ suggesting that “each case has to be determined on its own merits.”⁵¹

Problem of ‘Content’ and ‘Application’

The issue of the interests of the justice, as it appears in article 53 of the Rome Statue, represents one of the most contentious and complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly) but there is no clear guidance on what the content of the idea is.⁵²

The “interests of justice” provision in article 53 is a tool, which may never be applied by the Prosecutor and subsequently reviewed by the Pre-Trial Chamber. This provision lies at the heart of the prosecutorial discretion, whereas at the same time it challenges the rationale underpinning the creation of the International Criminal Court.

⁴⁶ ICC-OTP, Policy Paper on the Interests of Justice at 3 (Sept. 2007).

⁴⁷ WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE, Article 53, Initiation of an investigation 660(2010).

⁴⁸ Giuliano Turone, *Powers and Duties of the Prosecutor*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT Vol. 1, 1153 (A. Cassese, P. Gaeta and J. R.W. D. Jones eds., 2002).

⁴⁹ WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE, Article 53, Initiation of an investigation 667(2010).

⁵⁰ *Id.*

⁵¹ Morten Bergsmo and Pieter Kruger, *Article 53*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1073 (O. Triffterer ed., 2nd ed., 2008) whereas Chris Gallavin, *Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?* 14 K.C.L.J. 186(2003) talks of an “internal or intrinsic” interpretation of the interest of justice.

⁵² ICC-OTP, Policy Paper on the Interests of Justice (Sept. 2007).

The International Criminal Court was created to end impunity for the most serious crimes of concern to the international community as a whole.⁵³ At the same time, article 53(1)(c) and (2)(c) empowers the Prosecutor not to proceed with an investigation or prosecution, when the interests of justice criterion is not served.

The interests of justice reference has been linked to propositions that it could be used as a loophole allowing the Prosecutor to consider the option of truth and reconciliation commissions, national amnesties and the prospect of peace process agreements, all considered to be of non-legal but mostly political nature.⁵⁴ These questions were not finally addressed by the Rome Statute, a product of compromises, despite the exchange of opinions during the negotiation period.⁵⁵

Yet, the “interests of justice” reference is not only a problem of content (meaning *in abstracto*). It is also a problem of application (meaning *in concreto*).⁵⁶ This latter dimension, pertains to the width and scope of the policy priorities and extra legal considerations that the Prosecutor may take into account, while exercising his/her discretion. The ongoing academic and not only dialogue, triggered by the “creative ambiguity”⁵⁷ of the article 53 language, illustrates the dynamic nature of this reference.⁵⁸ Thus, it has been supported that “[t]he exercise of prosecutorial discretion

⁵³ See Rome Statute, prmb. para. 5.

⁵⁴ See eg. MARK FREEMAN, NECESSARY EVILS, AMNESTIES AND THE SEARCH FOR JUSTICE 83 (2010) where he claims that “the interests of justice test has been at the heart of the Article 53 debate, and of the global debate on amnesty as such”. Yet, it is beyond the scope of this article an extensive analysis on amnesties.

⁵⁵ Hafner et al, *A response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT’L L. 108,109(1999).

⁵⁶ According to the understanding of the current author the interest of justice references is a hard case of “relative indeterminacy”. This term has been used by H.L.A. Hart to describe situations where vague expressions due to their “open texture” leave a margin of discretion, but they remain relative, since they need to be assessed within the limits of law. This doctrine also aims to preserve the objectivity of law and to differentiate it from politics and other considerations. Under this normative rubric the interests of justice term in article 53 includes a problem of content and a problem of application. See H.L.A. HART, THE CONCEPT OF LAW 128 (2nd ed. 1994) and MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA, THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 26, 40 (2nd ed., 2005).

⁵⁷ The term “creative ambiguity” is attributed to Philip Kirsch, former president of the ICC and chairman of the Rome Diplomatic Conference, Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 521-2 (1999).

⁵⁸ Indicative enough are the following articles: Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507 (1999), Diba Majzub, *Peace or Justice? Amnesties and the International Criminal Court*, 3 MELB. J. INT’L L. 247 (2002), Arsanjani, *The International Criminal Court and National Amnesty Law*, ASIL Proceedings 1999, Jessica Gavron, *Amnesties in the light of developments in International Law and the establishment of the International Criminal Court*, 51 INT’L & COMP. L.Q. 91-117(2002), Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J.INT’L CRIM.JUST. 695-720 (2005), Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J.INT’L L. (2003), Thomas Hether Clark, *The Prosecutor of the International Criminal Court*,

in accordance with Article 53 bears the potential of gradually crystallizing a coherent approach to the room left for alternative responses and for the exercise of prosecutorial discretion on the domestic level”.⁵⁹ Others have called the reference “a safety valve”, “an expression that was intended to leave the exercise of prosecutorial discretion unfettered”⁶⁰ or “an escape clause”⁶¹ that allows the prosecutor “to arbitrate between the imperatives of justice and the imperatives of peace.”⁶²

In general, there are three different sets of argumentation regarding the prosecutorial discretion, its scope and application as prescribed in the interests of justice reference in article 53 of the Rome Statute and subsequently its role towards amnesties, alternative justice mechanisms and peace negotiations. There were some who hailed the existence of this provision in the statute and advocated for the inclusion of broader considerations of security and stability when applied,⁶³ others who acknowledged the option of prosecutorial discretion, within its limits though, provided both by the mandatory judicial review and the current legal trends,⁶⁴ whereas the last group considered it at least controversial and risky for the legitimacy of the overall project of international criminal justice, proposing instead a restrictive

Amnesties, and the ‘Interests of Justice’ Striking a Delicate Balance, 4 WASH. U. GLOB. STUD. L. REV. (2005), Kenneth A. Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, 22 L.J. INT’L L. (2009), Richard Goldstone & Nicole Kritz, *International Criminal Court, In the Interests of Justice and Independent Referral: The ICC Prosecutor’s Unprecedented Powers*, 13 L.J. INT’L L. (2000), Chris Gallavin, *Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?* 14 K.C.L.J. (2003), Henry Lovat, *Delineating the Interests of Justice*, DENV. J. INT’L L. & POL’Y (2007), Dražan Dukic, *Transitional Justice and the International Criminal Court- in ‘the interests of justice’?*, 89 INT’L REV. R. C. (2007), Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. (2000), MARK FREEMAN, NECESSARY EVILS, AMNESTIES AND THE SEARCH FOR JUSTICE 82-84 (2010), LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS, BRIDGING THE PEACE AND JUSTICE DIVIDE 286-291 (2008).

⁵⁹ JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 291 (2008).

⁶⁰ William A. Schabas, *Prosecutorial Discretion v. Judicial activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 748, 749 (2008).

⁶¹ MARK FREEMAN, NECESSARY EVILS, AMNESTIES AND THE SEARCH FOR JUSTICE 83 (2010).

⁶² Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT’L CRIM. JUST. 178 (2005) (citing further William Bourdon in LA COUR PÉNALE INTERNATIONALE, 2000)).

⁶³ See eg., Le Fraper Du Hellen, *Round Table: Prospects for the Functioning of the International Criminal Court*, in *The Rome Statute of the International Criminal Court: A Challenge to Impunity* 300 (M. Politi and G. Nesi eds., 2001) and Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 488 (2003).

⁶⁴ Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT’L CRIM. JUST. 708 (2005).

interpretation.⁶⁵ This latter position has been adopted, by the three leading non-governmental organizations (Human Rights Watch, Amnesty International, International Federation for Human Rights), which oppose fiercely any potential application by the Prosecutor, building up their argumentation on a series of legal and policy points.⁶⁶ The restrictive view regarding the interests of justice reference, rejects any policy considerations, claiming that the object and purpose of the Rome Statute does not allow for a deferral by the Prosecutor under this clause.

In September 2007 the Office of the Prosecutor (OTP) issued a policy paper, addressing the issues arising from the interests of justice clause. That policy paper was the product of consultations between the Office of the Prosecutor and non-governmental organizations, dated back to November-December 2004.⁶⁷

Firstly, the paper emphasizes that the exercise of prosecutorial discretion under article 53(1)(c) and 53 (2)(c) is exceptional.⁶⁸ Secondly, it adopts a teleological interpretative approach focusing on the dimension of prevention of the core crimes as one of the objects and purposes of the Statute.⁶⁹ Finally, the drafters of the policy paper highlight its most controversial argument, that there is a difference between the notion of the interests of justice and the interests of peace and in the latter case, they support that there are other responsible institutions assigned to deal with concerns of security and stability.⁷⁰

Regarding the interests of the victims, the policy paper reiterates its strict flexibility, since it initially acknowledges, that despite the wording of article 53(1)(c) which implies the preference of the victims for prosecutorial justice, there is still the possibility of divergent views, which the Office of the Prosecutor assures that will be

⁶⁵ See eg. Human Rights Watch, *Policy Paper: The meaning of “the interests of justice” in article 53 of the Rome Statute*, Jun.4, 2005 available at: <http://www.hrw.org/campaigns/icc/docs/ij070505.pdf>, Amnesty Int’l, *Open Letter to the Chief Prosecutor of the International Criminal Court: The concept of interests of justice*, Jun.2, 2005, Héctor Olásolo, *The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?*, 3 INT’L.CRIM. L.REV. 87-150 (2003).

⁶⁶ See Human Rights Watch, *Policy Paper: The meaning of “the interests of justice” in article 53 of the Rome Statute*, June 4, 2005 available at: <http://www.hrw.org/campaigns/icc/docs/ij070505.pdf> [hereinafter HRW policy paper], Amnesty Int’l, *Open Letter to the Chief Prosecutor of the International Criminal Court: The Concept of Interests of Justice*, June 2005 available at: <http://www.amnesty.org/en/library/info/IOR40/023/2005> [hereinafter Amnesty Int’l policy paper], FIDH, *Comments on the Office of the Prosecutor's draft policy paper on « The interest of Justice »*, (Sept. 14, 2006) available at: http://www.fidh.org/IMG/pdf/FIDH_comments_-_interests_of_justice_-_final.pdf [Hereinafter FIDH comments].

⁶⁷ ICC-OTP, *Policy Paper on the Interests of Justice* 1,3(Sept. 2007).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

respected.⁷¹ Yet, it reiterates that the interests of victims of any merit for the process before the OTP, are confined to issues of criminal justice.⁷²

Finally the policy paper acknowledges that criminal justice is only a limited component of the overall project of combating impunity for the most serious crimes of concern to the international community as a whole and “as such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.”⁷³ However, it fails to address the scenario, where those other justice tools could be contributed in the existence of “exceptional circumstances,” which would make the Prosecutor to abstain from an investigation or prosecution under the interests of justice criterion. Thus, it can be safely concluded that the policy paper does not accept those “other” mechanisms as a feasible alternative to criminal justice.

Doing *justice* to the interest of justice

In particular, among the three above mentioned potential scenarios for application of the specific reference, the peace-justice approach of the OTP triggered a polarising dialogue, predominantly between political scientists and lawyers, in the context of northern Uganda and Darfur.⁷⁴ The Office of the Prosecutor never used (at least they never admitted that they considered) the interests of justice provision and proceeded with indictments in the situation of Northern Uganda, DRC, Darfur, Kenya and Lybia.

The peace- justice debate, despite the clear objective of the Office to address the interests of the victims in article 15 and 53, highlighted the problematique regarding the goals and vision of the Court as a whole. The response to this critique emphasized the need for independent, impartial and objective application of the adopted selection criteria for situations.⁷⁵ The persistence in objectifying the selection process revealed a dynamic dichotomy between those who consider the project of international criminal justice a clear case of pre-determined goals and those who appear to be more

⁷¹ *Id.*

⁷² *Id.*

⁷³ ICC-OTP, Policy Paper on the Interests of Justice at 7 (Sept. 2007) referring further to the Report of the Secretary General on the Rule of Law and Transitional Justice in conflict and post conflict societies, U.N.Doc. S/2004/616(Aug.23, 2004).

⁷⁴ See eg. the contributions in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* (Wadell & Clark eds., 2008) and the collected essays of the Oxford Transitional Justice Research, *Debating Justice in Africa*, The Centre for Socio-Legal Studies, University of Oxford, (2008-2010).

⁷⁵ ICC-OTP, Policy Paper on Preliminary Examinations, November 2013.

skeptical towards the specific proposition.⁷⁶ The same position (pro-objective criteria) purports to differentiate law from politics and reflects the “liberal theory of politics.”⁷⁷ Yes, the need for prosecutorial guidelines in a generic manner, which “[g]uide but not prescribe in advance decision making”, can be definitely acknowledged.⁷⁸ Yet, while a series of scholars link the concept of legitimacy of the Court with the exercise of prosecutorial discretion⁷⁹ and the need for specific and clear criteria, *ex ante* standards, their analysis appears to develop in hypothetical scenarios, which actually touch upon another fundamental contention, that until the *telos* of the International Criminal Court is defined in clarity and its unique nature fully understood, the conversation on prosecutorial criteria misses its point of reference.⁸⁰ The present paper will attempt to introduce the question of legitimacy via the threefold framework of legal, moral and sociological legitimacy.

The fault lines of legitimacy⁸¹ and the ICC

Since Nuremberg there is a growing movement on combating impunity for gross violations of human dignity, which develops under the premises of the rule of law concept.⁸² The Nuremberg principles summarize the normative core upon which

⁷⁶ Stephanos Billas & William Whitney Burke-White, *International Idealism meets Domestic-Criminal Procedure Realism*, 59 DUKE L. J. 637, 681-2 (2010) *but see* Margaret M. deGuzman, *Gravity and the legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L. J. 1435-1449 (2009).

⁷⁷ MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA, THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 24 (2nd ed. 2005) (1989).

⁷⁸ James A. Goldston, *More Candour about Criteria, The exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT’L CRIM. JUST. 403 (2010)

⁷⁹ See e.g. A. Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. (2003), James A. Goldston, *More Candour about Criteria, The exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT’L CRIM. JUST. (2010), Philippa Webb, *The ICC Prosecutor’s Discretion Not to Proceed in the “Interests of Justice”*, 50 CRIM. L. Q. (2005), Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT’L CRIM. JUST. (2005), D.D. Ntanda Nsereko, *Prosecutorial Discretion before National Courts and International Tribunals*, 3 J. INT’L CRIM. JUST. 127 (2005), M.B. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 76 (2004), William A. Schabas, *Prosecutorial Discretion v. Judicial activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 733 (2008).

⁸⁰ See e.g., Margaret de Guzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 268-269 (2012), A. Greenawalt, *Justice without politics? Political Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 650 (2007).

⁸¹ Hilary Charlesworth, *Conclusion: The Legitimacies of International Law*, in FAULT LINES OF INTERNATIONAL LEGITIMACY 396 (Charlesworth & Coicaud eds., 2010).

⁸² See e.g., A. Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998) and A. Cassese, *On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law*, 9 EUR. J. INT’L L. 2 (1998), Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT’L L. 325 (1997), Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 HUM. RTS. Q. 262 (1993)

the field of modern international criminal law was built.⁸³ It is founded on the perception of a global community that purports to retain and strengthen shared moral values with the aim to foster peace and coexistence.⁸⁴ Professor Bassiouni, while developing his theory on punishment for *jus cogens* international crimes, refers to a *civitas maxima* which “transcends the interests of the singular” on a common interest in “repressing certain international crimes,”⁸⁵ while the late Antonio Cassese speaks about “universal values”.⁸⁶

This position, though, is far from uncontested. Thus, this “oceanic feeling”⁸⁷ advocating for the universality of humanity, which shares the same goals and purposes, has been severely criticized as a “cosmopolitan dream” or even as a hegemonic project of the West to “civilize” the rest of the world.⁸⁸ But even if it is accepted that there is this humanity, which shares common moral aspirations, then as Mark Drumbl observes, “[i]t is one thing to agree to the universal repudiation of the great evils and to agree that victims are entitled to accountability. It is another matter to accept the universality of categorizing the great evils as crimes.”⁸⁹

Within this context, the International Criminal Court

[a]spires to institutionalize the ideal of universal justice. In its inclusive notion of human suffering in which ‘all peoples are united by common bonds’ the ICC embodies the cosmopolitan world view in which all victims are citizens deserving the protection afforded by the rule of law. The Court’s intent to treat all people equally and to privilege no one over another is a cornerstone of cosmopolitanism’s regard both for ‘*the moral worth of persons*’ [and] the *equal*

W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT’L L. 175 (1995)

⁸³ See G.A. Res. 95(I), U.N.Doc. A/95(I)(Dec.11,1946); G.A. Res. 177(II), U.N.Doc A/177(II)(Nov.21, 1947), BRUCE BROOMHALL, *INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT, BETWEEN SOVEREIGNTY AND THE RULE OF LAW*, 19 (2003).

⁸⁴ Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT’L CRIM. JUST. 2006, David Luban, *A theory of Crimes against Humanity*, 29 YALE J. INT’L L. 85 (2004) and LARRY MAY, *CRIMES AGAINST HUMANITY, A NORMATIVE ACCOUNT* (2005), Antonio Cassese, *The Rationale for International Criminal Justice*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, 123, 127 (Antonio Cassese ed., 2009), Steven Roach, *Value Pluralism, Liberalism and the Cosmopolitan Intent of the International Criminal Court*, 4 J. HUM. RTS. 475, 485-486 (2005).

⁸⁵ M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW*, 33 (2003).

⁸⁶ Antonio Cassese, *The Rationale for International Criminal Justice*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, 123, 127 (Antonio Cassese ed., 2009).

⁸⁷ Martti Koskeniemi, *The Subjective Dangers of World Community*, in *REALIZING UTOPIA, THE FUTURE OF INTERNATIONAL LAW*, 3, 5-11 (Antonio Cassese ed., 2012) emphasizing the aspect of power and the danger of authority in the argumentation for universality.

⁸⁸ See eg. David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, Speech delivered at the International Law Association, British Branch, University College London and School of Oriental and African Studies, (Mar. 2006), MARTTI KOSKENIEMI, *THE GENTLE CIVILIZER OF NATIONS* (2001), see also COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE, THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* (2007).

⁸⁹ MARK DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* (2007).

moral of *all* persons.⁹⁰

Trying to find a balance between this quest for cosmopolitan values and global institutional framework, the majority of the legal scholars, despite the “faith of the international criminal lawyer”⁹¹ resort to legitimacy in order for Koskeniemi to “ensure a warm feeling in the audience”.⁹²

The concept of legitimacy in general has obtained a variety of contents and for that reason a proliferation of theories and modalities may be observed.⁹³ It has even been supported that it is exactly this indeterminacy of the concept that makes it such an attractive concept at least in the international arena.⁹⁴ At the same time the elusive content of legitimacy has been severely criticized as another instrumentalized power exercise at the expense of “formality”.⁹⁵ It can be broadly supported however that the notion of legitimacy implies the justification of authority⁹⁶ either to render binding rules or binding decisions with an element of deference.⁹⁷

The notion of legitimacy carries both a normative and sociological meaning.⁹⁸ The former implies the *right to rule* irrespective of the existence of coercion, whereas

⁹⁰ Victor Peskin, *An ideal becoming real? The International Criminal Court and limits of cosmopolitan vision of justice*, in COSMOPOLITANISM IN CONTEXT, PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY, 196 (Pierik & Werner eds., 2010).

⁹¹ See, e.g., David S Koller, *The Faith of the International Criminal Lawyer*, 40 NYU J. INT’L L & POL. 1019 (2008) and Immi Talgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT’L L. 561 (2002).

⁹² Martti Koskeniemi, *Legitimacy, Rights, Ideology; Notes towards a Critique of the New Moral Internationalism*, 7 ASSOC. (2003), Martti Koskeniemi *Formalism, Fragmentation, Freedom: Kantian’s Themes in Today’s International Law*, 4 NO FOUNDATIONS: J. EXTR. L. POS. (2007), Jan Klabbers, *Setting the Scene*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 37-34 (Klabbers, Peters & Ulfstein eds., 2009), Jan Klabbers, *Normative Pluralism: An Exploration*, in NORMATIVE PLURALISM AND INTERNATIONAL LAW, EXPLORING, GLOBAL GOVERNANCE 29-33 (Klabbers & Piiparinen eds., 2013)

⁹³ See, e.g., THE LEGITIMACY OF INTERNATIONAL ORGANISATIONS (Coicaud & Heiskanen eds., 2001), ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004), THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) and LEGITIMACY IN INTERNATIONAL LAW (Wolfrum & Roben eds., 2008), David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552 (1993).

⁹⁴ John Tasioulas, *Parochialism and the Legitimacy of International Law*, in PAROCHIALISM, COSMOPOLITANISM, AND THE FOUNDATION OF INTERNATIONAL LAW 17 (Sellers ed., 2012)

⁹⁵ See in particular, Martti Koskeniemi, *Formalism, Fragmentation, Freedom: Kantian’s Themes in Today’s International Law*, 4 NO FOUNDATIONS: J. EXTR. L. POS. (2007),

⁹⁶ For the concept of authority see HANNAH ARENDT, BETWEEN PAST AND FUTURE, EIGHT EXERCISES IN POLITICAL THOUGHT 93 (1968) who supports that “[i]f authority is to be defined at all, then it must be in contradistinction to both coercion by force and persuasion through arguments.”

⁹⁷ Rudiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, in LEGITIMACY IN INTERNATIONAL LAW 6 (Wolfrum & Roben eds., 2008), Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT’L L. 601 (1999).

⁹⁸ Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405 (2006).

the latter entails the *belief of the right to rule*.⁹⁹ Or as Bodansky explains, the sociological or *popular* dimension of legitimacy presupposes acceptance of authority by the public as justified.¹⁰⁰ Whereas normative legitimacy prerequisites justification of authority on an “objective” sense.¹⁰¹ Additionally, while the normative form of legitimacy requires a process of evaluation, the sociological version is predominantly of empirical nature.¹⁰² In that sense despite their proximity and sporadic interrelations, the two dimensions of legitimacy remain distinct.

Alternatively, there are three main angles that the notion of legitimacy is perceived with. The first one is the procedural view of legitimacy, which is predominantly legal. Legal legitimacy reiterates the initial validation of authority via state consent and provides the conditions under which the authority is considered to be legitimate, [t]he condition of being accordance with law or principles.¹⁰³ The second view of legitimacy is the moral one, developed on an idea of justice, like the one developed by Allen Buchanan who emphasises the importance of the moral justification for an entity to act.¹⁰⁴ According to this theory, the entity secures its moral justification when it protects human rights and advocates for justice.¹⁰⁵ Finally, the third perspective of legitimacy is the subjective one, as evolved by Ian Hurd, who focuses on the perception of a norm irrespective of its moral value.¹⁰⁶

The tripartite dichotomy is also reflected in the diversification between source, procedural and substantive based legitimacy.¹⁰⁷ The first one implies consent, the second one entails fairness whereas the last one requires desirable outcomes depending on the relevant audience.¹⁰⁸ Each of these perspectives defines legitimacy

⁹⁹ *Id.*

¹⁰⁰ Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT’L L. 602 (1999).

¹⁰¹ *Id.*

¹⁰² John Tasioulas, *Parochialism and the Legitimacy of International Law*, in PAROCHIALISM, COSMOPOLITANISM, AND THE FOUNDATION OF INTERNATIONAL LAW 16-20 (Sellers ed., 2012).

¹⁰³ See Richard H. Fallon, Jr., *Legitimacy and The Constitution*, 118 HARV. L. REV. and Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT’L L. 605 (1999). 1794 (2005) and

¹⁰⁴ ALLEN BUCHANAN, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 187 (2004).

¹⁰⁵ *Id.*

¹⁰⁶ IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* 7 (2007).

¹⁰⁷ Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT’L L. 612 (1999).

¹⁰⁸ Rudiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, in *LEGITIMACY IN INTERNATIONAL LAW* 6-7 (Wolfrum & Roben eds., 2008).

in a very different way, whereas the complexity of the relevant audience has at least to be acknowledged.

Returning to the particular angle of the paper, the exercise of prosecutorial discretion has been linked to the overall function and legitimacy of the International Criminal Court. In this context, as it was mentioned before, several scholars suggest the adoption of *ex ante* guidelines, which would objectify the selection process, add transparency and clarification in the work of the main figure, the Prosecutor and thus enhance the legitimacy of the Court.¹⁰⁹ Mainly they suggest the pursuit of legitimacy via right process.¹¹⁰

Under this rubric, it has been supported that the legitimacy of the international criminal tribunals derives “[f]rom the manifested fairness of their procedures and punishments”.¹¹¹ Professor Bassiouni similarly has claimed that “[t]he legitimacy of the ICC will not be sustained on the basis of occasional referrals based upon political expediency but will depend on the consistency of its work”,¹¹² adding that “[t]he success of the ICC will not be predicated on the simple arithmetic of case numbers but on the regular flow of cases and more particularly on the fairness, objectivity and effective management and costs of the institution”.¹¹³ Margaret deGuzman on the other hand, exploring particularly the concept of gravity, has argued that the jurisdictional threshold of gravity serves the moral or legal legitimacy of the Court, whereas the notion of “relative gravity” enhances the sociological legitimacy of the International Criminal Court.¹¹⁴

However, one could observe a confusion about the various aspects of legitimacy, where procedural requirements are mixed with sociological dimensions and moral expectations with legal or subjective validation.¹¹⁵ Still, the demanding

¹⁰⁹ See eg. A. Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. (2003), James A. Goldston, *More Candor about Criteria, The exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT’L CRIM. JUST. (2010), Brian D. Lepard, *How should the ICC Prosecutor exercise his or her discretion? The Role of Fundamental ethical principles*, 43 J. MARSHALL L. REV. 553-567(2010).

¹¹⁰ Danner for example, although acknowledges the perceived angle of legitimacy, still she insists on the procedural legal one, while applying the model developed by Chayes.

¹¹¹ David Luban, *Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of the International Criminal Law in THE PHILOSOPHY OF INTERNATIONAL LAW* 579 (Besson & Tasioulas eds., 2010).

¹¹² M. Cherif Bassiouni, *The ICC-Quo Vadis?*, 4 J. INT’L CRIM. JUST. 426(2006).

¹¹³ *Id.*

¹¹⁴ See Margaret M. deGuzman, *Gravity and the legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L. J. 1435-1449 (2009).

¹¹⁵ Hilary Charlesworth, *Conclusion: The Legitimacies of International Law*, in FAULT LINES OF INTERNATIONAL LEGITIMACY 396 (Charlesworth & Coicaud eds., 2010). In particular see Jose E. Alvarez, *The Quest for Legitimacy: An Examination of The Power of Legitimacy Among Nations by*

quest of legitimacy, might provide a more nuanced and humble understanding of the overall function and capability of the Court, contextualising the demand for a more coherent and effective attribution of justice.¹¹⁶

From Legitimacy to Legitimization?¹¹⁷

The first decade of prosecutorial action and inaction triggered an interesting debate between academics and practitioners. Legal and policy questions were raised in an unprecedented exchange of opinions among public international and criminal lawyers, among realists and idealists or otherwise apologists and utopians.¹¹⁸ The justice-peace debate, in northern Uganda, DRC and Darfur with the arrest warrant against a current Head of State, and more recently the situation of Libya, carried both a strong legal and sociological dimension of legitimacy where the strict application of the Rome Statute, contravened with diverse social perceptions both on the affected societies and among the legal community. This latter controversy put the OTP in an unprecedented turmoil, elevating to the level of a Schmitian dichotomy between enemy and friends.¹¹⁹

Yet, the natural subsequent question to be asked is, legitimacy to the eyes of whom? The International Criminal Court functions among an array of relevant constituencies such as the state parties, the civil society and the directly affected communities, the “victims”. Additionally the diverse angles of legitimacy, legal, moral and subjective one, add a second level of normative uneasiness. At the same time, the Rome Statute has raised different expectation to the various constituencies that exacerbate the legitimacy gap. This “global” community consists of states, individual experts, ngos, victims and affected communities. Each of these actors defines the goals of the Court in a different way according with each own priorities.

Thomas M. Franck, 24 N.Y.U. J. INT’L L & POL. 199, 207 (1991) and Martti Koskenniemi, Book Review, 86 AM. J. INT’L L. 175, 178 (1992) (reviewing THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990)) (proposing that legitimacy must also take account of “available notions of authentic human justice”)

¹¹⁶ See Human Rights Watch, *Unfinished Business, Closing the Gaps in the Selection of the ICC Cases*, September, 2011 [hereinafter HRW policy paper], supporting that [D]elivering meaningful justice requires coherent and effective strategies designed to ensure that investigations and prosecutions resonate with the concerns of victims and affected communities.

¹¹⁷ See Mikael Rask Madsen, *Sociological Approaches to International Courts*, in OUP HANDBOOK OF INTERNATIONAL ADJUDICATION (Alter, Romano & Shany, 2013).

¹¹⁸ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA, THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2nd ed. 2005) (1989).

¹¹⁹ See Sarah M. H. Nouwen and Wouter G. Werner, *Doing justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 4, 941-965 (2011).

The Rome Statute is the product of very good intentions. It is beyond the purpose of this contribution to doubt the values of its drafters. Yet, it can be argued, that due to its special character, the credibility or legitimacy of the International Criminal Court, is enhanced when the affected communities that it is purported to serve, share a minimum at least standard of acceptance.¹²⁰ Otherwise, the Court becomes the subject of discourse among a small elite, who shares thorough knowledge and access to its functions, excluding those who are immediately affected but its decision.¹²¹

Within this context the idea of *legitimization* as pronounced by a series of sociologists¹²² appears to provide another way to deal with the problems arising from a narrow application of a normative concept of legitimacy focusing strictly on procedural fairness¹²³, representation and transparency.¹²⁴ Under this normative rubric and applying the sociological model of Weber, the Court and in our case the Prosecutor has to be reflexive and not only representative of the society. In that sense she should interact not only with the legal elites and the states but also with the society, in an open dialogue where the Office of the Prosecutor will acknowledge the various expectations and subsequently adjust its policies in order to legitimize its practice.¹²⁵

¹²⁰ This is founded on the recognition that sociological legitimacy enhances the normative one, or as Yuval Shany refers to the interrelation between internal and external legitimization in the context of judicial effectiveness, Yuval Shany, *Assessing the Effectiveness of International Courts: a Goal-Based approach*, 106 AM. J. INT'L L. 2 (2012).

¹²¹ See Martti Koskenniemi, *The Politics of International Law, 20-Years Later*, 20 EUR. J. INT'L L. 1(2009) and his reference to the doctrinal shift from indeterminacy to structural bias within specified regimes, see also Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HAST. L. J.

¹²² See Mikael Rask Madsen, *Sociological Approaches to International Courts*, in OUP HANDBOOK OF INTERNATIONAL ADJUDICATION (Alter, Romano & Shany, 2013) and his sources.

¹²³ See characteristically Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 G. W. INT'L L. REV. 107 (2010).

¹²⁴ Even new studies on ICTs, focus entirely on Court's public authority, the issue of democratic legitimacy and the new roles of ICTs without exploring further the sociological aspects of legitimacy, see e.g. Armin Von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Court's Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7-41 (2012) and Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of the Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49-72 (2013), and also Karen Alter, *The Multiple Roles of International Courts and Tribunals, Enforcement, Dispute Settlement, Constitutional and Administrative Review*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, THE STATE OF ART (Dunoff & Pollack eds., 2013), and Benedict Kingsbury, *International Courts: uneven judicialization in global order*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203 (Crawford & Koskenniemi eds., 2012).

¹²⁵ See Mikael Rask Madsen, *Explaining the Power of International Courts in their Contexts: From Legitimacy to Legitimization*, in COURTS, SOCIAL CHANGE AND JUDICIAL INDEPENDENCE (RSCAS Policy Paper, EUI 2012).

This suggestion appears to be in contract with the adopted position by the OTP to focus on the legal or procedural legitimacy, which contributes to a predominantly external legitimization. It is not enough for the OTP to address solely source or else input legitimacy and process or procedural one. In order to achieve a holistic form of legitimization the OTP should also be concerned with so called result based legitimacy, the one which can be identified with outcomes that influence state conduct.

This legitimization process will allow the OTP to engage in a sincere dialogue, which will be especially beneficial at least when considering the interests of justice reference. As it was mentioned above the interests of justice reference is a question of content and application, central among a diversity of perceptions and the existence of a normative schism between those who very characteristically have been described as “judicial romantics” and “political realists.”

From Legitimization to *Fair Balance* (μέτρον) using the tool of the interests of justice.

The International Criminal Court consists of a hard form of legalization, containing all three characteristics.¹²⁶ However, the institutionalisation of justice¹²⁷, as it had been evolved within the context of juridification¹²⁸ and judicialisation¹²⁹, starts encountering suspicions and critique.¹³⁰ According to the prevailing opinion among

¹²⁶ See Abbott, Keohane, Moravcsik, Slaughter and Snidal, *The Concept of Legalization*, in LEGALIZATION AND WORLD POLITICS 17-18 (Goldstein, Kahler, Keohane & Slaughter eds., 2001).

¹²⁷ See e.g., YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 3–7 (2003), Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003), Cesare P. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N. Y. U. J. INT’L L. & POL. 709 (1999), Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT’L L. & POL. 791, 797-98 & n.18 (2007) Garry Born, *A New Generation of International Adjudication*, 61 DUKE L. J. 775 (2012).

¹²⁸ RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

¹²⁹ Benedict Kingsbury, *International Courts: uneven judicialization in global order*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203 (Crawford & Koskeniemi eds., 2012)

¹³⁰ See Thomas Skouteris, *The New Tribunalism: Strategies of De(Legitimization in the Era of Adjudication*, 17 FINN. YEARBOOK INT’L LAW, 307 (2006), Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73 (2009), Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 L.J. INT’L L. 553–579 (2002), but see Benedict Kingsbury, *International Courts: uneven judicialization in global order*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203 (Crawford & Koskeniemi eds., 2012) who concludes that the project of judicialisation has not been subjected to severe critique and the current status of attitude is more reformist rather than rejectionist

legal scholars and experts, the International Criminal Court is a judicial institution. But could it be also a political body? And if it is not a purely judicial body, then this twofold dimension (being both a criminal and a security court) how can it be substantiated? In other words, what are the goals of the International Criminal Court? Are its purposes confined in rendering individual accountability or should the Court promote reconciliation, peace and security on the ground? If this is the case then when should the Court intervene? Moreover, in the case of intervention, wouldn't the Prosecutor consider political and exogenous factors contrary to his persistence that those parameters are outside his spectrum?

The present paper supports that the International Criminal Court is a *sui generis* creation functioning under the premises of the first scenario, that of the Court being a hermaphrodite institution. If we accept that there is a legal proprium of universal condemnation of the core crimes, then the interests of justice reference with its openended character is a fundamental legal and policy tool to render the Prosecutor invulnerable to political expediency, guiding him in the quest for harmony and fine balance (μέτρον).

The normative dimension of metron (μέτρον) in the specific context means fine balance, balance between the various goals of the International Criminal Court. In this sense, until the scope of the Court is delineated, the Prosecutor may confront the tension arising from the demands for accountability and the realities on the ground, using the tool of the interests of justice reference, as a “[g]uarantee of prosecutorial diplomacy”.¹³¹ Furthermore, the interests of justice clause empowers the Prosecutor with a sense of fairness. Fairness here means rightness, an intrinsic quality of balance.¹³² In Greek, the word *Δικαιοσύνη* entails both concepts of justice and fairness. *Δίκαιο* means both just and fair. To ignore the realities on the ground entails the risk to render criminal justice a project without merit. To be apprehensive on the other hand of the particularities of the societies that are at stake is not only a quality of justice but also of fairness.

In this exercise the Prosecutor of the Court, must demonstrate the virtue of right balance, or else *phronesis* as it has been developed in the Aristotelian philosophy

¹³¹ MARK FREEMAN, *NECESSARY EVILS, AMNESTIES AND THE SEARCH FOR JUSTICE* 83 (2009).

¹³² The present thesis does not adopt the retributive dimension of fairness as developed by Thomas Franck in his seminal work, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS*.

of Ethics.¹³³ The virtue of *phronesis* liberates the Prosecutor from legalistic constraints and guides her towards fair and contextualized decisions.¹³⁴ Yes, the Prosecutor must apply the law; yet, the application of her prosecutorial discretion should be exercised under the auspices of fair balance and wisdom.

In a different context Thomas Franck wrote that “[l]aw...does not thrive when its implementation produces *reductio as absurdum*: when it grossly offends most persons common moral sense of what is *right*.”¹³⁵ In the framework of the International Criminal Court, it can be argued that the fairness of a prosecutorial decision, does not solely affect the due process rights of the accused. A second dimension of fairness is reflected in the broader implications of the prosecutorial exercise. Since the Prosecutor is empowered by this kind of discretion, it would be truly tragic if she overlooked and/or misused this power.

Conclusion

The current paper purports to highlight the importance and complexity of the concept of legitimacy within the context of the ICC under the particular angle of prosecutorial discretion. The demand for further independence and transparency, advocated by a series of scholars and activists reveal, the perplexed function of legal, moral and sociological legitimacy, based on the importance of procedural fairness for the foundation of the belief that a decision is legitimate.

This is an open ended dialectic process that requires a more nuanced and flexible attitude towards the multilayered concept of legitimacy. Pure legalistic-process oriented approaches can provide only a limited insight, missing the actual impact of the Court. On the other hand sociological perceptions have to be assessed via the eyes and expectations of the various audiences. However all this theoretical framework presupposes an understanding and realisation of the goals of the International Criminal Court.

133 I am indebted to Prof. Klabbers for pointing towards this direction. See the very enlighten work of Outi Korhonen, *New International Law: Silence, Defence or Deliverance?*, 7 EUR. J. INT’L L. 1 (1996) and Jamie Gaskarth, *The Virtues of International Society*, 18 Eur. J. Int’l R. (2012).

134 See Jan Klabbers, *Towards a Culture of Formalism? Martti Koskenniemi and the Virtues*, 27 TEMPLE INT’L & COMP. L. J. (2013), claiming that the “culture formalism” and “constitutional mindset” of Koskenniemi’s scholarship, reflect a virtue ethics approach.

135 THOMAS M. FRANCK, *RECOURSE TO FORCE* 178 (2002).

Decades ago Hannah Arendt wrote for the Eichmann Trial among other things the following: “[I] held and hold the opinion that this trial had to take place in the interests of justice and nothing else.”¹³⁶ Under the Rome Statute the interests of justice usage is unique, allowing the Prosecutor to forego the investigation of core crimes and the prosecution of the ‘worst’ criminals even when all the jurisdiction and admissibility parameters have been fulfilled.

Despite its extraordinary function, this reference serves as a safety net for the Prosecutor and the Court, because it simply recognizes the limits of international criminal justice. In that regard, the Prosecutor should explore its potentials in a way that would liberate her from accusations of being either utopian or apologetic, too political or non-political at all, a guarantor of justice or spoiler of peace.

¹³⁶ HANNAH ARENDT, EICHMANN IN JERUSALEM, A REPORT ON THE BANALITY OF EVIL, 286 (1977).

